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NOTES

THE CLEVELAND INVALIDITY CLAUSE

A NEW DEVELOPMENT IN PUBLIC-UTILITIES ORDINANCES

By the terms of the Tayler ordinance, the Cleveland traction war of nearly nine years' duration was brought to an end in February, 1910, the people ratifying the ordinance in a referendum. A detailed exposition of this instrument has been made elsewhere,¹ so that it will not be necessary to review its numerous provisions again. For the purpose of this note, however, it will be necessary to state the cardinal stipulations. They are four in number:

I. A sliding scale of fares.

II. Control of service through a city street railroad commissioner.

III. Arbitration of disputes over fares, service, accounts, issuance of securities, etc., by a board.

IV. Ultimate municipal ownership or control of the traction system. All other provisions of the ordinance either supplement or define these four underlying propositions.

It would seem, then, that definite conservation of these chief provisions would have been regarded as a matter of fundamental importance and that some most effective safeguards would have been incorporated in the ordinance to assure their integrity. Yet not only was this need unheeded by the chief framer of the ordinance, the late Judge Robert W. Tayler, until late in the settlement negotiations, but it was not met until public sentiment and a threat on the part of the city² to withdraw from the peace conference had forced consideration to be given it. The bitter experience of certain American communities with local telephone monopolies had impressed its moral upon Mayor Johnson and City Solicitor Baker. When tested in the Supreme Court of the United States, franchises granted these companies by careless or trusting city councils were found to have been so drawn as to leave the companies free to enjoy the benefits of their bargain, while escaping its burdens. The city's chief officers, accordingly, urged the incorporation in the pending

¹ T. L. Sidlo, "The Cleveland Street Railway Settlement," *American Political Science Review*, May, 1910. See also article on the same subject by E. W. Bemis, *Quarterly Journal of Economics*, May, 1910.

² The Johnson administration was still in office (November, 1910).

ordinance of such safeguards with reference to its leading provisions as should secure the city's interests in the event of bad faith on the part of the company or avoidance by the courts. Public opinion, on the other hand, while clamoring for peace, did not want it at any cost; an uppermost thought was still to insure against treachery.

In consequence of the pressure brought to bear by these two forces, there was finally added to the ordinance a quartet of clauses providing substitutes for the main provisions of the ordinance, in case any or all failed of operation. The purpose of this series of substitutes was to insure that the municipality be protected in the possession of those advantages it had won as the result of the long struggle, by restoring it to *status quo* or better. On account of their contingent character, these four sections have come to be known as "invalidity clauses," and as such mark a new development in public-utilities legislation.

While the theory underlying this new device is perhaps not unknown to the law of contracts,³ considered as a practical legislative device it has received its first real working-out in Cleveland. In general, the clauses afford a means of converting so-called vested interests in public utilities, with all the arrogant and odious security which so often attends them, into probational or vesting interests, dependent for their life upon the measure of fair play and good faith which those interests choose to show in their relations with the municipality. Moreover, it is said on the best of authority that the courts will give full recognition to them. This feeling was strengthened while the ordinance was pending by the vigor with which the latter's lawyers—some of the most skilful utilities lawyers in the country—combated their introduction.

What, now, do the "invalidity clauses" provide specifically? Sec. 47 is to the following effect:

a) If the provisions respecting rates of fare should ever be adjudged invalid, the power to fix such rates shall vest in the city council, which shall observe meanwhile the same limitations upon its power which governed the operation of the supplanted automatic scale.⁴

³ After a fashion, the "invalidity clause" resembles a type of the "condition subsequent."

⁴ The ordinance utilizes the sliding-scale principle in its fare provisions, the scale ranging from a two-cent cash fare to a four-cent cash fare and seven tickets for a quarter.

b) If the provisions respecting arbitration should ever be adjudged invalid, the council shall assume the functions of the board of arbitration.

c) If the provisions respecting the street railroad commissioner should ever be adjudged invalid, the city may designate the city auditor, or any other officer or employee of the city, to perform the same function.

d) If the city, having obtained the legal authority to do so, should ever decide to purchase, or if it should ever nominate a licensee, and the company should refuse to sell, such refusal will work a forfeiture of the grant.

These, then, are the four contingencies anticipated by the "invalidity clauses," contingencies that lie at the very heart of the ordinance. So well have they been drafted in the Tayler ordinance that the writer has deemed it worth the space to reprint them in full as models for future public-utilities ordinances.

SEC. 47. The purpose of this ordinance is to establish and settle the relations between the city of Cleveland and The Cleveland Railway Company by a contract which shall secure to The Cleveland Railway unimpaired the capital value described in section 16 hereof, and the rates of return thereon provided in said section, and which will also secure to the city of Cleveland adequate and efficient service at the cost thereof, not exceeding the maximum fare specified in section 22; and the provisions of this ordinance in respect to the fixing, from time to time, of rates of fare to be charged by the company, the provisions in regard to the ascertainment of the value of the property of the company and the items from time to time constituting the capital value thereof, the provisions in reference to the designation of the city street railroad commissioner and the duties to be performed by him, the provisions with respect to the right and power of the city, through the city street railroad commissioner or otherwise, to be informed, by inspection of the books, papers, documents, vouchers, and property of the company, as to value of said property and the cost of service, and the provisions in respect to the acquisition of the property of the company by the city, or by a purchaser designated by the city therefor, as set forth in the several sections of this ordinance dealing with said subjects, are mutually understood and declared to be in their substance material to the accomplishment of the aforesaid purposes for which this contract is made; but nevertheless, in order to avoid an entire failure of this grant in consequence of invalidity of any of the aforesaid provisions, it is further provided as follows:

1. If any material part of the provisions of this ordinance in respect

to the fixing, from time to time, of the rates of fare to be charged by the company, including the submission of such rates of fare to arbitration in case of disagreement between the parties, shall be adjudged to be invalid, then, except as provided in section 40, all of the provisions hereof respecting the increase or decrease of fare, after the expiration of the period during which the initial rate of fare is to continue in force, as prescribed by section 23, shall be abrogated, and, in lieu thereof, the council of the city of Cleveland shall have power, from time to time, to fix by ordinance the rate of fare to be charged by the company for the transportation of passengers, not exceeding the maximum rate specified in section 22; but the council shall not at any time decrease the rate of fare unless there shall then be a sum exceeding \$500,000 in the interest fund; and any rate of fare so fixed by the council shall not impair the ability of the company to earn sufficient money to meet the payments provided for in sections 16 and 18 hereof, after paying operating expenses and maintenance and such other allowances for depreciation and renewals as may from time to time be made pursuant to the provisions of this ordinance.

2. If any material part of the provisions of this ordinance providing for the settlement or decision by arbitration of questions other than the increase or decrease of the rate of fare which may arise between the city and the company shall be adjudged to be invalid, then, as to any such question thereafter arising between the parties, and which, by the terms hereof, is to be so submitted to arbitration, the council of the city of Cleveland shall be substituted for the board of arbitration by this ordinance provided, and the said council shall be empowered to determine such question in accordance with the rules and principles herein prescribed, so far as the same may be applicable, and its action shall be binding on both parties, unless the same shall be annulled or modified by a court of competent jurisdiction; and if the question involved be in reference to service, the company shall at once install the kind of service directed by the council until such court shall order otherwise.

3. If, at any time, the provisions of this ordinance for the designation of a city street railroad commissioner shall be held invalid, or if, at any time, there shall be no city street railroad commissioner, the city may designate the city auditor, or any other officer or employee of the city, to perform all the duties, and to have all the rights, privileges, and powers in this ordinance described as appertaining to the city street railroad commissioner.

4. In case, however, the city, having legal authority so to do, shall determine to purchase and take over the property of the company, or a part thereof, or in case the city shall designate a licensee to purchase the same, as provided in sections 32, 33, and 44, refusal by the company to comply with any material provision of said sections, or any of them, or of any other provision of this ordinance designed to carry out such purchase by the city,

or by such purchaser, whether on the ground that the same are not binding on it or for any other reason, shall work a forfeiture of the grant made by this ordinance.

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THE MEANING OF SOCIAL SCIENCE ¹

This is a group of ten lectures delivered before a company of graduate students from various departments, called by the author social science departments, of the University of Chicago, in the year 1909-10. Two main themes are developed in the first five chapters: first, that there must be a fundamental and underlying unity to all the studies which have to do with society; second, that there is no such unity in the present state of the social sciences unless it be found in the study of sociology. The author does not, it is true, insist upon the name of sociology, but merely upon the necessity of a study, of whatever name, which will bring together in one body of knowledge the essential and unifying principles common to all the special sciences that have to do with social relations. The next four chapters attempt to trace, through its several phases, the actual development of this unified social science. These four phases, each one of which is the subject of a chapter, are named the descriptive, the analytical, the evolutionary, and the constructive phases. The final chapter is on the future of social science.

The author has stated his views so frequently, always with such peculiar force and pungency, that everyone is already familiar with his general point of view. In this work he has massed his arguments more systematically and completely than anywhere else, so far as the reviewer is aware, and the well-known vigor and sledgehammer quality of the author's style has never been better displayed. Every chapter bristles with epigrams which lend themselves readily to quotation by the partisans of his school, and are peculiarly irritating to his opponents. Without intending it, perhaps without even being aware of it, the author is always a controversialist, and throughout the whole work there is a distinct controversial tone, though his manner is always dignified and courteous. If one might venture a criticism upon a writer of such standing as the author, it would be to the effect that there is, in this book, sometimes more

¹ *The Meaning of Social Science*, by Albion W. Small; Chicago: The University of Chicago Press, 1910. 8vo, pp. 309. \$1.50 net.